SUPREME COURT

OCT 2002

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IN THE SUPREME COURT

Appeal from the Court of Appeals
Honorable William C. Whitbeck, Presiding

PAUL DRESSEL and THERESA DRESSEL,
on behalf of themselves and all others
similarly situated,

Plaintiffs-Appellees, Docket No. 119959

v

AMERIBANK, a state savings bank,

Defendant-Appellant.

BRIEF OF AMICUS CURIAE MICHIGAN ASSOCIATION OF REALTORS®

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2), having granted Defendant-Appellant Ameribank's Application for Leave to Appeal on April 23, 2002.

COUNTER-STATEMENT OF QUESTION INVOLVED

I. SHOULD THIS COURT ADOPT THE POSITION OF THE STATE BAR OF MICHIGAN THAT THE SELECTION AND COMPLETION BY NON-LAWYERS OF CUSTOMARY, STANDARD FORM DOCUMENTS UTILIZED IN CONNECTION WITH COMMON, EVERYDAY COMMERCIAL TRANSACTIONS CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW WHENEVER THE SELECTION AND/OR COMPLETION OF THE FORM DOCUMENT IMPLICATES THE EXERCISE OF LEGAL DISCRETION OR JUDGMENT?

Amicus Curiae State Bar of Michigan answers "Yes";

Amicus Curiae Michigan Association of REALTORS® answers "No".

I. INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Association of REALTORS® (the "Association") is Michigan's largest non-profit trade association, comprised of 48 local boards and a membership of more than 26,000 brokers and salespersons licensed under Michigan law. Each day, the Association's members are involved in hundreds of real estate transactions that typically involve the use of a number of preprinted, "fill in the blank" type forms such as buy-sell agreements and disclosure statements mandated by law. Additionally, these transactions typically involve other businesses such as mortgage lenders and title insurers whose role in the transaction also involves the use of such standard, preprinted forms. The use of these standard, preprinted forms is critical to the efficient and effective transfer of real property in this State. Consequently, the Association and its members have a significant interest in the outcome of any court decision that involves the issue whether the use of such forms by non-lawyers constitutes the unauthorized practice of law in the State of Michigan.

II. POSTURE AND PURPOSE OF THE INSTANT BRIEF

Consistent with its interest in the outcome of this appeal, the Association previously filed a brief amicus curiae (the Association's "Prior Brief") in support of Defendant-Appellant, Ameribank's, Application for Leave to Appeal (Ameribank's "Application"). In its Prior Brief, the Association set forth in detail the reasons why it believes the Court of Appeals erred in reaching the result it did in this case. As this Court is by now well aware, the Court of Appeals held that a bank which charges a separate fee for document

preparation in connection with a mortgage loan engages in the unauthorized practice of law in violation of MCL 450.681.

On April 23, 2002, this Court granted Ameribank's Application and also granted various motions to file briefs amicus curiae that were submitted by the Association and several other interested parties. By letter of the same date, the Clerk of this Court also invited the State Bar of Michigan (the "State Bar") to participate as amicus curiae. See, Amicus Brief of the State Bar of Michigan (the "State Bar's Brief"), p 5. The Association has obtained a copy of the State Bar's Brief, filed with this Court on August 20, 2002. Having reviewed the State Bar's Brief, the Association submits the instant Brief Amicus Curiae to supplement the arguments set forth in its Prior Brief, and to respond directly to the arguments raised by the State Bar.

III. SUMMARY OF ARGUMENT

A. The State Bar's Position

From all that appears, the purpose of the State Bar's Brief is to urge this Court to adopt an "exercise of legal discretion" test for purposes of defining the unauthorized practice of law. According to the State Bar's Brief:

> There is a factual dispute in this case as to whether the preparation of the documents in question involved, or should have involved, the application of discretion involving legal issues. If it does not, the State Bar agrees with AmeriBank that the document preparation is not the practice of law, authorized or unauthorized.
>
> Some aspects of AmeriBank's document preparation, however, appear necessarily to implicate legal discretion.
>
> * * * * *
>
> If the challenged practice involves only simple "fill in the blanks" forms, which for the purposes of sale on the secondary market may

> not be altered or added to in any way, and which affect and secure only the legal rights of the lender, then the State Bar would agree with AmeriBank and its amici that the practice does not and should not be characterized as the practice of law, regardless of whether or not a fee is charged to borrowers.
>
> * * * * *
>
> However, if there is discretion or judgment involved in preparation of legal documents offered to another party for that party's signature and affecting the rights and obligations of that party, then that preparation logically must fall outside the protection of the exception, whether or not a fee is charged, so as not to pass the risk of the lay person's judgment unknowingly on to the other party.
>
> * * * * *
>
> The central question in the determination of whether a particular activity is the practice of law is whether the activity should require the application of legal knowledge and discretion.

See, State Bar's Brief, pp 9-12, 14 (footnote omitted, emphasis added).

In urging the adoption of an "application of legal discretion" test, the State Bar highlights three "aspects" of document preparation which it claims involve the practice of law:

> Three aspects of the document preparation process are particularly worthy of attention, because they implicate discretionary judgment: document selection, information concerning the status of the property owners, and nonuniform covenants. When there is a range of legal documents with different legal consequences available to accomplish a particular purpose, the act of choosing a document is discretionary.
>
> * * * * *
>
> In addition to the document selection aspect of the activity in question, at least one aspect of the information AmeriBank adds to the documents implicates legal discretion and consequences: the status of co-owners of property. If two unmarried individuals jointly purchase real property, they must decide whether to take title as "joint tenants' or "tenants in common." Filling in the

> blanks in such cases requires not only knowledge of the status of the co-borrowers but also knowledge and application of the various types of joint ownership.
>
> Finally, although AmeriBank and its amici place great emphasis on the uniform, standardized nature of the forms they prepare, there is evidence in the record that the mortgage actually used in this case contained non-standard covenants added by a non-attorney. The covenants are not part of the standard mortgage "form" and are legally binding obligations. Their presence in these documents should raise a red flag about characterizing AmeriBank's entire document preparation operation as simply ministerial.

See, State Bar's Brief, pp 14-18.

B. The Association's Counterposition

The Association submits that the State Bar's position should not be adopted as the definitive test for what constitutes the "unauthorized practice of law" within the meaning of MCL 450.681. As will be discussed below, an "exercise of legal discretion" test is completely unworkable from a practical standpoint, and this Court's prior decisions, examined at length in the Association's Prior Brief, all but expressly acknowledge as much. Perhaps more important, the State Bar's position cannot be reconciled with the language of MCL 450.681. Finally, much of the State Bar's Brief is devoted to emphasizing the need for extensive testimonials and "empirical" fact-finding, which the State Bar contends is necessary in order to more accurately define what should and should not constitute the unauthorized practice of law in Michigan. See, e.g., State Bar's Brief, p 17. The Association maintains that the place to conduct such policy directed fact-finding missions is before the state legislature, not this Court.

The Association submits that in view of the express language contained in MCL 450.681, as well as the prior decisions of this Court, the State Bar's advocation of an "exercise of

legal discretion" test is misguided. Lenders, REALTORS®, and other commercial business professionals should continue to be allowed to select and complete standard form documents incidental to their lawful business activities without being deemed to have engaged in the unauthorized practice of law.

IV. ARGUMENT

A. Standard Of Review

Whether this Court should adopt an "exercise of legal discretion test" for determining what constitutes the unauthorized practice of law by a corporation under MCL 450.681 presents a question of law. Such questions are subject to de novo review by this Court. Terrien v Zwit, _____ Mich _____; 648 NW2d 602 (2002).

B. Argument

Without citing any relevant authority, the State Bar alleges that Michigan law has been "particularly vigorous" in regulating the unauthorized practice of law in the context of residential real estate transactions. See, State Bar's Brief, p 13.[1] In a word, this assertion is inaccurate. A review of this Court's prior decisions reveals that this Court has recognized that

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[1] Many of the assertions in the State Bar's Brief concerning the purported state of the law in Michigan and elsewhere are not supported by citation to any relevant authority. As this Court stated long ago in Mitcham v City of Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959):

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

the use, selection and preparation of standardized forms is both a necessary and desirable component of the modern practice of buying and selling real estate.

For example, the State Bar argues that the selection of which form to use to accomplish a given result implicates a sufficient amount of legal judgment to trigger the need for an attorney's skill. In State Bar of Michigan v Cramer, 399 Mich 116; 249 NW2d 1 (1976), this Court succinctly explained why such a result would be completely impractical.

> A broad definition of the 'practice of law' embraces virtually all commercial areas of human endeavor. This, of course, will not do.
>
> > 'It cannot be urged, with reason, that a lawyer must preside over every transaction where written legal forms must be selected and used by an agent for one of the parties. Such a restriction would so paralyze business activities that very few transactions could be expeditiously consummated * * *'. State ex rel. Indiana State Bar Association v Indiana Real Estate Association, 244 Ind. 214, 191 N.E.2d 711 (1963).

Id at 133 (emphasis added).

The Association submits that absent from the State Bar's Brief is any measurable recognition of these very real pragmatic concerns, concerns which permeate this Court's prior jurisprudence governing the unauthorized practice of law in the State of Michigan. The Association does not dispute that the public should be protected from the dangers of legal advice given by those not trained to provide it. Indeed, in this respect, lenders who allow their lay employees to provide such advice, or who fail to constrain them from giving it, are just as much at risk of sustaining the consequences of legal error as are the loan applicants themselves. With all due respect to the State Bar's position, however, the Association submits that this Court's

prior jurisprudence takes into account this minimal risk in allowing lay persons to select and complete standardized form documents in the context of residential real estate transactions.

For example, in Ingham County Bar Ass'n v Walter Neller Co, 342 Mich 214; 69 NW2d 713 (1955), this Court quoted with approval the following observations from Cowern v Nelson, 207 Minn 642; 290 NW 795 (1940):

> 'The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers' field. We think that ordinary conveyancing, part of the every day business of the relator, is within that region and consequently something of which the legal profession cannot under present circumstances claim that the public welfare requires restraint by judicial decree.'
>
> The court further stated:
>
> 'We do not think the possible harm which might come to the public from the rare instances of defective conveyances in such transactions is sufficient to outweigh the great public inconvenience which would follow if it were necessary to call in a lawyer to draft these simple instruments.'

Walter Neller Co, supra, 342 Mich at 236 (emphasis added).[2]

Similarly, in State Ex Rel Indiana State Bar Ass'n v Indiana Real Estate Ass'n, 244 Ind 214; 191 NE2d 711 (1963), a case quoted with approval by this Court in Cramer, supra, the Indiana Supreme Court observed:

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[2] Among other cases, this Court in Walter Neller Co declined to follow the decision in Washington State Bar Ass'n v Washington Ass'n of Realtors, 41 Wash 2d 697; 251 P2d 619 (1952), a case in which a concurring justice opined that the selection of the proper form constitutes the unauthorized practice of law. See, Walter Neller Co, supra, 342 Mich at 223.

> The Bar Association, in its brief, has expressed great concern as to the consequences of permitting the filling in of blanks in legal forms by persons not members of the bar. The possibility of an occasional improvident act in the use of such forms may not, with reason, be made the basis for denying the right to perform the same act in a thousand instances where the public convenience and necessity would seem to require it. Lawyers, themselves, on rare occasions have been known to make errors in the drafting of such forms.

Id, 191 NE2d at 715 (emphasis added).

Also weighing against the State Bar's position is this Court's decision in Detroit Bar Ass'n v Union Guardian Trust Co, 282 Mich 216; 276 NW 365 (1937). In Detroit Bar Ass'n, the defendant was a trust company that had, in part, been enjoined by the circuit court from drafting trust instruments under which the defendant was authorized, by statute, to act as a fiduciary. Id at 223-224. Arguing that this facet of its business did not constitute the unauthorized practice of law, the defendant trust company maintained that the drafting of trust instruments was simply part of the normal course of the business it was legally authorized to perform. Id at 224. This Court agreed with the defendant, and in so doing, reasoned as follows:

> The specific question for determination on this phase of the instant case is whether there was error in the circuit judge's decree wherein, without qualification, it enjoins the defendant from: 'Drafting, or having drafted for others by its attorneys or attorney or others selected or paid by it therefor, any * * * trust agreements or proposed form or outline thereof intended for individual use.' The contention of defendant in substance is that in so far as the decree enjoins it from drafting trust agreements which by their terms are revocable by the trustor and which contain no provisions of a donative or testamentary character, it deprives defendant of the right to exercise powers with which it has been lawfully vested by the legislature; and that the question of such powers being exercised by defendant and other trust companies is a legislative question, not one for judicial control. As a reason for its contention defendant points out that trust agreements, which are

> revocable by the trustor and which do not contain provisions of a donative or testamentary character, are mere agreements between the contracting parties fixing their respective rights and duties, that drafting such agreements in no way constitutes the practice of law, and does not involve conduct on the part of the respective parties over which courts have judicial control. We think defendant's contention is sound. Within the limitations indicated drafting trust agreements is no more the practice of law, nor does it any more contemplate action in or by the courts, than does the ordinary run of agreements in the every day activities of the commercial and industrial world. A construction agreement may be considered as a fair example. If the contract project is of any magnitude, it involves the making, the adoption, the interpretation, and the execution of plans and specifications. It is a matter of common knowledge that often, and perhaps usually, these details are of such a complex and technical character as not to be readily understood by the property owner who is a party to the construction contract. Nonetheless his right to enter into such a contract cannot be questioned nor is it requisite that it be drafted by one skilled in that field. The same may be said of trust agreements of the limited character which the defendant is now contending that it has the right to solicit, draft, and consummate with perspective trustors.

Id at 228-229 (emphasis added).[3]

The Association submits that this reasoning is applicable to the case at bar, not to mention the circumstances of countless other business professionals. Even where the exercise of some measure of discretion is involved, the selection and completion of various instruments – including the drafting of non-standard provisions – is an integral part of the every day activities of the commercial and industrial world. As this Court has recognized on several occasions, classifying such activities as the unauthorized practice of law would likely result in commercial paralysis, not to mention the imposition of significant, unnecessary costs upon

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[3] This holding would appear to contradict directly the statement at pages 24-25 of the State Bar's Brief that "nonattorney preparation of any legal documents" incidental to the lawful business of a lender is "contrary to all Michigan case law."

consumers and businesses. Walter Neller Co, supra; Cramer, supra. For these reasons, a lender that selects and prepares loan documents, or a REALTOR® who selects and completes form documents in connection with the sale of real estate, and countless other business professionals who perform similar activities, should not be deemed to have engaged in the unauthorized practice of law within the meaning of MCL 450.681.

Implicit, if not explicit, in the State Bar's argument is the notion that it would be permissible to allow bank employees or agents who are licensed attorneys to advise, counsel, and/or draft documents in connection with the discretionary aspects of a transaction. See, State Bar's Brief, pp 14, 16 and 22. The problem with that scenario, however, is that the language of MCL 450.681 would nevertheless prohibit it. In this regard, MCL 450.681 provides, in relevant part:

> Any corporation or voluntary association violating the provisions of this section, and every officer, trustee, director, agent or employee of such corporation or voluntary association who directly or indirectly engages in any of the acts herein prohibited or assists such corporation or voluntary association to do such prohibited acts shall be guilty of a misdemeanor. . . The fact that such officer, trustee, director, agent or employee shall be a duly and regularly admitted attorney-at-law shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited herein nor shall such fact be a defense upon the trial of any of the persons mentioned herein for a violation of the provisions of this section.

In Bay Co Bar Ass'n v Finance System, Inc, 345 Mich 434; 76 NW2d 23 (1956), this Court quoted with approval from the decision in Nelson v Smith, 107 Utah 382; 154 P2d 634 (1944). The language taken by this Court from Nelson further illustrates the point:

> 'The fact that the defendants in some instances employ a regularly licensed attorney to prepare necessary legal papers and conduct the

> trial of a suit does not make their conduct legal. One cannot do through an employee or an agent that which he cannot do by himself. If the attorney is in fact the agent or employee of the lay agency, his acts are the acts of his principal or master. When an attorney represents an individual or corporation, he acts as a servant or agent. Since he acts for others in a representative capacity, does those things were are customarily done by an attorney, he practices law within the meaning of Section 6-0-24. The same conduct on the part of laymen would likewise be the practice of law, and since said layman would be unlicensed, such practice would be illegal. The prohibition against the practice of law by a layman contained in Section 6-0-24 applies alike to the practice by a layman directly and in person and to the indirect practice through an agent or employee. It is immaterial that said layman may select duly licensed attorneys as his agents or employees through whom he practices law. If the attorney be in fact the agent or employee of a laymen, his act is that of the layman (his principal). Such principal would be engaging in the illegal practice of law if he through such an agent rendered legal services to a third party for compensation and as a regular and customary business practice.'

Bay Co Bar Ass'n, supra, 345 Mich at 443.

In view of this authority, the Association submits that it is logically inconsistent to suggest that MCL 450.681 was designed to prohibit unlicensed individuals from exercising legal discretion on behalf of corporations when the utilization of someone licensed to exercise such discretion will not fix the problem. Instead, as discussed at length in its Prior Brief, the Association submits that the relevant inquiry can be found in this Court's decision in Walter Neller Co, supra, where this Court stated:

> We believe that the determining point is set forth in the further statement of the Missouri court [in Hulse v Criger, 363 Mo 26; 247 SW2d 855, 861 (1952)], when it said:
>
> > 'We think the guiding principle must be whether under the circumstances the preparation of the papers involved is the

> business being carried on or whether this really is ancillary to and an essential part of another business.'

Walter Neller Co, supra, 342 Mich at 225.

Although Walter Neller Co involved the selection and preparation of documents by licensed REALTORS®, the rationale underlying the above principle is not, nor should it be, limited to those individuals who broker real estate. Indeed, in Walter Neller Co, this Court quoted with approval the following passage from Childs v Smeltzer, 315 Pa 9; 171 A 883 (1934):

> 'There can be no objection to the preparation of deeds and mortgages or other contracts by such brokers so long as the papers involved pertain to and grow out of their business transactions and are intimately connected therewith. The drafting and execution of legal instruments is a necessary concomitant of many businesses and cannot be considered unlawful * * *. A real estate broker is not prohibited from drawing a deed of conveyance or other appropriate instrument relating to property of which he or his associates have negotiated a sale or lease.'

Walter Neller Co, supra, 342 Mich at 226-227 (emphasis added).

Similar observations appear in the Indiana Supreme Court's decision in Miller v Vance, 463 NE2d 250 (1984).[4] In Miller, the Court compared the activities of bank employees with those of real estate brokers and observed not only that the filling in of blanks on approved mortgage forms was incidental to the bank's regular business activities, but also that it would be

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[4] The Court of Appeals cited the decision in Miller as support for the conclusion that a banking institution which charges a separate fee for legal document preparation engages in the unauthorized practice of law. Dressel v Ameribank, 247 Mich App 133, 141; 635 NW2d 328 (2001). Admittedly, the Court in Miller did hold, among other things, that banks could not charge a separate fee for preparing legal documents. Miller, supra, 463 NE2d at 253.

impractical to deem such conduct as constituting the unauthorized practice of law. In this regard, the Court in Miller explained:

> The instant case does not deal with real estate brokers but rather involves the lay employees of banks performing the routine service of filling in information on standard real estate mortgage forms. This service is incidental to and directly connected with the bank's regular business of making loans. The bank employees here were involved in preparing documents for routine business transactions with which they were thoroughly familiar in the same manner in which real estate brokers were involved in preparing documents routinely associated with their real estate transactions. While it is true that the preparation of mortgage instruments might be classified as the practice of law in some circumstances, that is not the case here. It is appropriate for bank employees to fill in the blanks on approved mortgage forms which have been prepared by attorneys in the same manner it is appropriate for real estate brokers to fill in the blanks on standard forms for real estate transactions.
>
> * * * * *
>
> It would be an unreasonable burden on the public for us to assert impractical and technical restrictions that have no reasonable justification on banks and their employees who are completing an integral part of their daily business transactions. Our finding here is consistent with the majority of other jurisdictions where this issue has been considered. Our rule here comports with the general rule that the drafting of documents, when it is incidental to the work of a specific occupation, is not generally considered to be the practice of law.

Id at 252-253 (emphasis added, citations omitted).

The Association submits that these observations are well taken, and in line with this Court's prior decisions addressing the unauthorized practice of law. The Association has no quarrel with the general proposition that a line must be drawn between ordinary commercial activities that necessarily involve the use of form legal documents, and those activities that

implicate the actual practice of law by untrained individuals. The question, however, is simply where to draw that line without bringing legitimate commercial activity to a "standstill." It suffices to say that commercial gridlock would be a foregone conclusion if contracting parties had to consult an attorney each time a document had to be selected in order to complete a transaction.

Moreover, the test articulated by the State Bar is unworkable. The State Bar readily admits that "it is not always obvious whether the proper preparation of particular documents requires the application of legal knowledge and discretion." See, State Bar's Brief, p 12, n 3. The State Bar maintains, however, that a "helpful" test can be found in the Indiana Supreme Court's decision in State Ex Rel Indiana State Bar Ass'n, supra. There, the Court observed generally that the filling in of blanks on form documents which require only "common knowledge regarding the information to be inserted" and "general knowledge regarding the legal consequences involved" does not constitute the practice of law. Id. On the other hand, the Court observed that when the filling in of the blanks involves "considerations of significant legal refinement," or legal consequences that are of "great significance to the parties involved," the practices are appropriately restricted to members of the legal profession. Id.

The Association submits that comparatively speaking, the test advocated by the State Bar is extremely difficult to apply when compared to a test which focuses on whether the activity is "ancillary to and an essential part of" another lawful business. One can argue forever regarding what constitutes "common knowledge" or "general knowledge regarding legal consequences." The same can be said with regard to what constitutes "considerations of significant legal refinement" or "legal consequences of great significance." Indeed, in terms of

these latter criteria, the Association fails to see how lay persons transacting business on a day-to-day basis would even be capable of evaluating them. In this respect, an "ancillary to and an essential part of another business" test has the advantage of being capable of broad-based application without the necessity of lay business persons constantly having to determine whether their conduct crosses some amorphous threshold of being considered the unauthorized practice of law.

In Cramer, supra, this Court focused the inquiry on whether the relationship at issue became "tantamount" to the relationship between an attorney and his client. At issue in Cramer was the conduct of a woman, not a licensed attorney, who not only provided customers with "do it yourself" divorce kits, but also provided individualized counseling and guidance to persons seeking a divorce. Cramer, supra, 399 Mich at 123-124. In upholding the circuit court's decision to issue an injunction, this Court articulated the operative distinction as follows:

> Concern for the quality of legal representation available to persons seeking a divorce was also expressed in Oregon State Bar v. Gilchrist, 538 P.2d 913 (Or.1975). The Court did not consider the advertisement and sale of do-it-yourself divorce kids containing the necessary forms together with an explanatory manual as constituting the unauthorized practice of law. However, the Court specifically distinguished this course of conduct from personal contact between defendants and their 'customers' in the nature of 'consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms or suggesting or advising how the forms should be used in solving the particular customer's marital problems'. The latter was enjoined because the relationship which developed between the parties was tantamount to that of attorney and client.
>
> We also believe this to be a significant distinction. The advertisement and distribution to the general public of forms and documents utilized to obtain a divorce together with any related textual instructions does not constitute the practice of law. There

> can be no serious challenge raised to this or any enterprise which is otherwise in compliance with those regulations applicable to products placed in the stream of commerce. Were defendant to limit her activity to providing forms and instructions regarding divorce, her undertaking would be analogous to that set forth in New York County Lawyers Assn. v Dacey, 21 N.Y.2d 694, 287 N.Y.S.2d 422, 234 N.E.2d 459 (1967), a case involving the publication and distribution of the book, How to Avoid Probate. The Court adopted the dissenting opinion below which stated:
>
> > 'There (was) no personal contact or relationship with a particular individual. Nor does there exist that relation of confidence and trust so necessary to the status of attorney and client. This is the essential of legal practice–the representation and the advising of a particular person in a particular situation. * * * At most the book assumes to offer general advice on common problems, and does not purport to give personal advice on a specific problem peculiar to a designated or readily identified person.' 28 A.D.2d 161, 171, 174, 283 N.Y.S.2d 984, 998 (1967).
>
> But defendant goes well beyond merely making available those materials necessary to effect a legal divorce. She advertises 'professional guidance' to her 'clients'. A personal conference is arranged between defendant and her client to discuss the divorce. The complaint and summons are prepared by defendant. Once completed, all documents incident to the divorce proceedings are prepared for the client's or the court's signature. Defendant occasionally files the completed forms in court. And, in most cases, she personally advises her clients as to the proper testimony to provide.

Cramer, supra, 399 Mich at 136-137 (emphasis added, footnote omitted).

Of similar import is language from the Indiana Supreme Court's decision in Miller, supra. Discussing the propriety of allowing bank employees who are not licensed attorneys to prepare mortgage instruments, the Court in Miller observed:

> This Court has not attempted to provide a comprehensive definition of what constitutes the practice of law because of the infinite variety of fact situations which must each be judged

> according to its own specific circumstances. However, we have stated that one of the basic elements in the practice of law is the giving of legal advice:
>
> > 'The core element of practicing law is the giving of legal advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney. The undertaking to minister to the legal problems of another creates an attorney-client relationship without regard to whether the services are actually performed by the one so undertaking the responsibility or are delegated or subcontracted to another.

Miller, supra, 463 NE2d at 251 (emphasis added, citation omitted).

Consistent with these observations, the Association submits that when lenders, REALTORS®, and countless other business professionals select, provide, and utilize various standardized forms in connection with their lawful business activities, their conduct does not become "tantamount" to that of an attorney advising his client. Cramer, supra. So long as no specific advice or counsel is provided as to the legal effect of the instruments or their provisions, providing loan applicants or prospective parties to a real estate transaction with commonly used forms and providing them with "general advice" and assistance relative to completing the those forms is not the equivalent of providing an individual with "personalized advice" on a "specific problem peculiar" to that individual. As the decisions in Cramer and Miller illustrate, the latter situation may properly be characterized as the unauthorized practice of law, while the former – based largely on the very real practical concerns previously discussed – is not.

Finally, the State Bar suggests that a "careful analysis" involving "testimony" and "economic scholarship," among other things, might warrant exempting the process of document selection from the unauthorized practice of law. Specifically, according to the State Bar's Brief:

> It may be that a careful analysis of the cost benefits and risks to consumers of the use of a standard federally approved form might support exempting the choice-of-document aspect of the loan documents of this type from UPL prosecution, subject to safeguards. Such an analysis ideally would involve testimony from a wide range of interested parties, including consumer groups, a review of empirical data and economic scholarship on the subject, and recommendations to the Court of a balanced, independent panel. The Court does not have the benefit of such an analysis in this case, and the State Bar urges caution about relaxing existing protections in the absence of such an analysis.

See, State Bar's Brief, p 17.

In response to these assertions, the Association submits that the most obvious and appropriate forum for engaging in such an analysis is the state legislature, not this Court. For years, this Court has recognized that modern commercial realities preclude characterizing the everyday selection and completion of form legal documents as the unauthorized practice of law. Any challenge to the wisdom of this determination involves an issue of social policy that should be directed to the legislature, which can appropriately determine whether an express prohibition against document selection is warranted.

V. CONCLUSION AND RELIEF REQUESTED

For all the within stated reasons, the Association respectfully requests that this Honorable Court reject the State Bar's position that the discretionary selection and drafting of form legal documents qualifies as the unauthorized practice of law within the meaning of MCL 450.168. For the reasons discussed above, the adoption of such a test would contravene

numerous practical and other considerations acknowledged in the prior decisions of this Court. Instead, lenders, REALTORS®, and other similar professionals should continue to be allowed to select and complete standard form documents incidental to their lawful business activities.

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